UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC	Case Nos.	14-CA-197985
and		14-CA-208424
CHARLES ROBINSON, and Individual		

BRIEF OF *AMICUS*

ASSOCIATION OF CORPORATE COUNSEL (ACC)

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STATEMENT OF AMICUS' INTEREST

ACC is a global bar association that promotes the common professional and business interests of in-house counsel. ACC has more than 45,000 members who are in-house lawyers employed by over 10,000 organizations in more than 85 countries. One of the principal activities of ACC is advocacy on public policy matters affecting ACC's members. As in-house counsel, many ACC members advise their employers on issues of labor and employment law, and ACC has more than 6,000 members in its Employment and Labor Law Network.

ACC members work for companies subject to the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151 et seq., as amended, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq., as amended, and other laws and regulations governing the workplace. Because their companies are potential defendants to claims of workplace harassment and discrimination, as well as violations of workers' labor rights, ACC members have a direct and ongoing interest in the issues presented in this appeal.

INTRODUCTION

Through a number of decisions dealing with employee conduct both in the workplace and on the picket line, the Board has established precedent that treats epithets or other demeaning language on the basis of race or sex[1] the same as language that is merely profane or insubordinate. When employees use racially and sexually derogatory language against other employees in the workplace, such conduct should not receive the same level of protection under

[1] Throughout this brief, we refer to language and conduct that is offensive on the basis of race or sex. We do this because the Board framed the issue with that language in its invitation for amicus briefs. However, we believe that this discussion should apply to conduct or speech that is offensive on the basis of any protected status under Title VII. We will continue to refer primarily to race and sex simply for purposes of brevity.

the National Labor Relations Act (NLRA) as merely profane or insubordinate language. As applied to racially and sexually derogatory speech, the Board should overrule its *Atlantic Steel* and *Clear Pine Mouldings* precedents as outdated and harmful to both employers and employees and establish new precedent that creates a presumption that the NLRA does not protect racially or sexually offensive speech and conduct.

We submit this brief as commentary only on the Board's precedent with respect to racially or sexually motivated speech and conduct. While we do question whether the Board's precedent as applied to profane and insubordinate language has been too deferential in protecting employees' labor rights over the employers' rights to enforce an orderly and civil workplace, there is less of a need to overrule current Board precedent to address that concern. Additionally, employers do not generally face legal liability from employees' use of insubordinate or profane language. For these reasons, we focus our inquiry on how the Board evaluates employee conduct and speech that is racially or sexually offensive.

ARGUMENT

The current Board precedent on racist and sexist speech by employees while engaged in protected labor activity under Section 7 of the National Labor Relations Act (NLRA) conflicts with anti-discrimination laws and frustrates corporate diversity efforts. Employees do not need to make racially or sexually offensive statements in order to exercise their labor rights, and an employer that prohibits such behavior generally should not have to tolerate it in the context of activity protected under the NLRA. ACC contends that it is time for the Board to establish a new precedent that balances protecting employee rights with employers' need to maintain a workplace free of harassment and discrimination.

I) The Board's current precedent for evaluating racially or sexually offensive language and conduct conflicts with anti-discrimination laws and therefore protects intolerable behavior in the workplace.

In the more than fifty years since Title VII was enacted, there have been dramatic shifts in what society considers acceptable workplace conduct. Even beyond what actions can create liability under Title VII, what was once acceptable workplace humor and speech around women, minorities and other protected classes is now not tolerated by employers. The Board's current precedent is out of line with workplace norms and is frustrating employers' efforts to make their workplaces more diverse and inclusive.

a. The Board has consistently protected employees who engage in racially or sexually offensive speech and conduct.

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." When an employee is disciplined or terminated for engaging in misconduct, the Board uses the *Atlantic Steel* factors to evaluate such employee behavior within the workplace and the *Clear Pine Mouldings* test for behavior that takes place on the picket line. In *Atlantic Steel*, 245 NLRB 814 (1979), the Board established a four-factor test to determine whether employee misconduct in the course of otherwise protected activity under the NLRA precludes the employee from protection of the Act. The four factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Clear Pine Mouldings* is the standard by which speech or conduct during a picket line or other strike activity is evaluated. A firing for picket-line misconduct is an unfair labor practice unless the alleged misconduct "may

reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, Inc., 268 NLRB 1044, 1046 (1984). These two standards have resulted in the Board protecting conduct that it admits is "reprehensible," as the Board rarely finds that discipline or employee discharge is justified due to racially or sexually motivated speech or conduct. In addition to the cases that are the subject of the Board's invitation to file briefs (*General Motors and Charles Robinson,* Cases 14-CA-197985 and 14-CA-209242 (hereinafter *"General Motors"),* and *Cooper Tire and Rubber Company,* 363 NLRB No. 193 (2016)), there are many examples of Board decisions that find employees who have used racially or sexually offensive language to be protected under the NLRA:

- In *Gloversville Embossing*, 297 NLRB 182 (1989), a striking employee called out to non-striking female employees, asking if they wanted to see "a real man" and exposed his genitals to them.
- In *Calliope Designs*, 297 NLRB 510 (1989), a striking employee repeatedly referred to female replacement workers as "whores" and "prostitutes" and told one of them that she could earn more money by selling her daughter (another non-striking worker) at the flea market.
- In *Nickell Moulding*, 317 NLRB 826 (1995), a striking employee carried a homemade sign that read "Who is Rhonda F [with an X through the F] Sucking Today?" while picketing a company facility. The sign referred to a specific employee who had crossed the picket line, and that employee complained about the sign.
- *Detroit Newspaper Agency*, 342 NLRB 223 (2004) involved a striking employee who approached the car of a non-striking employee, calling her a "f--king n----r loving b-tch

whore," telling her he hoped her children died, and that it was her fault that "white America" was losing its jobs.

- In *Airo Die Casting*, 347 NLRB 810 (2006), a striking worker approached a car carrying security guards still employed by the company, one of whom was African-American. The employee raised his middle fingers and shouted "F-ck you, n----r!" at the African-American guard.
- In *Freesnius USA Manufacturing*, 358 NLRB 1261 (2012), during a union decertification campaign, an employee scribbled pro-union statements using the term "pussies" to refer to other workers on union newsletters left in a breakroom, prompting complaints from female employees who saw the newsletters.

As represented by the above examples, most of the Board precedent addressing instances of employee discipline and termination for racist or sexist speech and conduct has been in the context of picket activity. The Board has been very tolerant when such misconduct occurs in the context of strike or picket activity, provided there is no "immediate" threat of violence or intimidation.[2] There are fewer cases outside of the strike context, but the few that exist also suggest a highly skeptical approach to employee discipline and/or termination due to racist or sexist speech if the employee is engaged in otherwise protected activity under the NLRA.

b. Employers that tolerate racist and sexist language of the type tolerated by Board precedent open themselves to liability under anti-discrimination laws.

In finding racist and sexist language to be protected under the NLRA, the Board has largely dismissed employers' assertions that doing so exposes employers to liability under anti-

[2] We note with curiosity the Board's reluctance to find the use of such offensive language as unlikely to induce violence. There are many courts that have found the use of racial slurs to qualify as "fighting words," under constitutional jurisprudence. See William C. Nevin, *Fighting Slurs: Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets*, 14 First Amend. L. Rev. 127 (2018).

discrimination laws – most notably Title VII of the Civil Rights Act. Title VII and similar state and local employment discrimination laws are clear that an employer must address discriminatory or harassing behavior in the workplace. When employers tolerate discriminatory and/or harassing behavior in the workplace, they may be liable for creating a "hostile work environment." A hostile work environment results when the harassing conduct is "severe or pervasive enough" to create an environment that a reasonable person would consider "intimidating, hostile, or abusive." An employer is automatically liable for such conduct by a supervisor and may also be liable when the harassing conduct is by non-supervisory employees if the employer was aware of the conduct and "failed to take prompt and appropriate corrective action."[3]

In dismissing employers' hostile work environment concerns, the Board has consistently pointed to cases where a single act of employee misconduct was deemed insufficient to create Title VII liability, noting that isolated incidents of harassing conduct are not severe or pervasive enough to create a hostile work environment. See, e.g., Brief for the National Labor Relations Board at 24, Cooper Tire & Rubber Company v. NLRB, Nos. 16-2721 and 16-2944, 866 F.3d But the fact is, the standards of liability under Title VII and similar laws are incredibly variable and difficult to predict. Yes, a single act by an employee (as opposed to a supervisor) generally is not enough to create Title VII liability, but courts routinely allow Title VII claims based on a single action to survive a motion to dismiss, indicating that a single action can indeed form the basis of a harassment claim. *See, e.g.*, *Castleberry v. STI Group*, 863 F.3d 259 (3d Cir. 2017) (pleading one egregious racial slur was enough to survive a motion to dismiss); *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1254 (11th Cir. 2014) (although a racially offensive carving on a

[3] See EEOC website at https://www.eeoc.gov/laws/types/harassment.cfm.

workplace wall "was an isolated act, it was severe" enough that a "reasonable jury could find that [plaintiff's] work environment was objectively hostile"); *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000) (finding that a single instance of an "extended barrage of obscene verbal abuse" created a hostile work environment). Additionally, there are state and local laws that have explicitly rejected Title VII's "severe and pervasive" requirement for liability. *See, e.g.*, California Fair Employment and Housing Act, New York State Human Rights Law; New York City Human Rights Law. The Board's assertion that a single employee act cannot result in liability under Title VII and other anti-discrimination laws is simply not the case.

Leaving aside the question of whether any single instance of sexually or racially derogatory speech or conduct can result in Title VII liability, the Board's position regarding the conflict between the NLRA and Title VII misses the forest for the trees by ignoring the very nature of how a hostile work environment claim arises. Multiple single acts of offensive speech or harassing conduct, when added together, create a hostile work environment that employers are obligated to prevent or remedy. When ACC members advise their companies on disciplinary actions or terminations for employee conduct that is racially or sexually motivated, they are looking at the bigger picture of how the company's reaction to a single incident builds an overall record of whether the company tolerates a hostile work environment. Because there is no magic number of incidents that create a hostile work environment, employers' most prudent legal approach is to err on the side of taking action against all incidents that might offend on the basis of a protected status under Title VII. Taking the example of the *Gloversville Embossing* employee above, suppose the company had not taken any action against the employee, and the employee returned to work after the strike. Six months later, he makes sexually offensive remarks and exposes himself to a female employee. The company's initial tolerance of his picket

line behavior will surely come in as evidence of a hostile work environment. In this way, the Board's precedent requiring companies to ignore instances of racially or sexually derogatory speech and conduct can directly contribute to liability under Title VII and similar laws.

The Board's position on Title VII liability also fails to recognize that employees do not actually have to be successful in their claims against employers to create financial and reputational impact. As noted above, because of the vagueness of Title VII standards, a single egregious instance of discriminatory and harassing conduct can be enough to make a colorable claim against an employer that requires engaging in the civil litigation process before the claim is ultimately settled or dismissed. While we know there are too many instances of true harassment and discrimination in today's workplaces, as in-house counsel, ACC members also see the many unfounded claims of harassment and discrimination that can result when an employee is disciplined or terminated for legitimate reasons. By way of illustration, in fiscal year 2018, the Equal Employment Opportunity Commission received more than 53,000 charges of Title VII harassment and discrimination violations.[4] Each charge filed at the EEOC, regardless of its merit, costs an employer time and resources spent on representation during the EEOC process. Even claims that an employer feels are meritless will often be settled because settlement is less costly than engaging in litigation. From the in-house perspective, hampering company efforts at taking preventative disciplinary measures against offending employees creates a more fertile environment for future costs to the company – regardless of actual court-imposed liability.

[4] Equal Employment Opportunity Commission, Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC) (includes concurrent charges with ADEA, ADA, EPA, and FINA) FY 1997 - FY 2018. Available at: https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (Last visited October 25, 2019).

c) Tolerating racially or sexually derogatory speech in the workplace frustrates companies' efforts to build more diverse and inclusive workplaces and does not contribute to workplace rights.

In addition to concerns about liability under Title VII and similar laws, the Board's precedent punishing employers for taking action against employees who use racially and sexually derogatory speech in the workplace is completely out of step with the goal of achieving diversity and inclusion in corporate America. The business community now widely accepts the need to go beyond the legal obligations of anti-discrimination laws towards creating workplaces that are more diverse and inclusive. The benefits of a diverse workplace – both to employees and the employer – has been well documented.[5] Indeed, more than 800 chief executive officers of the world's leading companies and business organizations have pledged to establish diversity and inclusion programs as well as maintain environments that encourage openness, trust, and dialogue among employees.[6] The Board's precedent forces companies to accommodate employees who have expressed racist or sexist views. This frustrates corporate diversity efforts by eroding corporate culture.

Unlike profane and insubordinate language, which is generally directed at a single individual, racial and sexual language implicates the speaker's attitudes towards an entire class of people. This is why racially or sexually derogatory speech is more harmful to the workplace than profanity or insubordination and should be treated differently. Multiple studies have confirmed the detrimental effects of racially or sexually motivated harassment on individual

[5] See, e.g., Cedric Herring, Does Diversity Pay? Race, Gender, and the Business Case for Diversity, AMERICAN SOCIOLOGICAL REVIW 74: 208-224; Katherine W. Phillips, Katie A. Liljenquist and Margaret A. Neale, Is the pain worth the gain? The advantages and liabilities of agreeing with socially distinct newcomers. PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 35: 336-350; Center for Talent Innovation, "Innovation, Diversity, and Market Growth," available at: http://www.talentinnovation.org/publication.cfm?publication=1400 (Last visited October 25, 2019); McKinsey & Company, "Why Diversity Matters," available at: https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters (Last visited October 25, 2019).

[6] See CEO Action for Diversity and Inclusion Pledge at https://www.ceoaction.com/ .

employees. For example, one study found that the psychological effects of sexual harassment can rise to the level of post-traumatic stress disorder or major depression.[7] The same connection has been made between racial discrimination and depression.[8] There is also a growing understanding that employees who observe or perceive the mistreatment of others in the workplace can suffer mental and physical harm themselves,[9] so promoting a workplace culture that is intolerant of harassing behavior benefits all employees. When under Board precedent, employers are forced to tolerate the offensive behavior they are seeking to discourage in their workplaces, they cannot foster a workplace culture that will realize the benefits of workforce diversity. This also frustrates the aim of Title VII in preventing harassment. As the EEOC's Select Task Force on the Study of Harassment in the Workplace noted in its 2016 report, "workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment."[10]

The Board has justified its precedent with the excuse that it cannot impede the naturally confrontational nature of a picket line and that replacement workers and strikers alike must be prepared to experience "unpleasantries in a strike situation." *Gloversville Embossing* at 194. Under this view, it does not matter that the racially or sexually motivated language has nothing to do with the protected labor activity. In these instances, the use of racially or sexually offensive speech and conduct was meant solely to inflame emotions and harass other workers in the most

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[7] See Lilia M. Cortina & Emily A. Leskinen, Workplace Harassment Based on Sex: A Risk Factor for Women's Mental Health Problems, in VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139 (C. GarcÍa- Moreno & A. Riecher-Rössler eds., 2013) (citing B. S. Dansky & D. G. Kilpatrick, Effects of Sexual Harassment, in SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152 (W. O'Donohue ed., 1997)).

[8] See, e.g., Hammond, Gillen, Yen, "Workplace Discrimination and Depressive Symptoms: A Study of Mutli-Ethnic Hospital Employees," Race Soc Probl. 2010 Mar 1; 2(1): 19–30.

[9] See, Kathi Minder-Rubino & Lilia Cortina, Beyond Targets: Consequences of Vicarious Exposure to Misogyny at Work, 92 J. APPLIED PSYCH. 1254, 1264 (2007).

[10] See https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm at page v. This same report recommended that EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage. Id. at page 68.

egregious manner. There is quite a difference between a picketer calling a replacement worker a "motherf---ng scab" and a "mother---ng ni---r." Striking employees can express hostility towards replacement workers without commenting on race, sex or any other protected status. Far beyond "unpleasantries," the type of behavior tolerated under NLRB precedent is the exact opposite of what most employers are trying to encourage – a workplace that is welcoming and respectful to all workers regardless of sex, race, class, ethnicity, age or any other immutable characteristic.

II) The Board should revisit its *Atlantic Steel* and *Clear Pine Mouldings* precedents to establish a rebuttable presumption that racist and sexist speech and conduct is not protected under the NLRA.

To reconcile the tension between the NLRA and anti-discrimination laws, as well as allow employers to promote workforce diversity and inclusion, we believe the Board should revisit its precedents under *Atlantic Steel* and *Clear Pine Mouldings* to create standards that result in a presumptive loss of protection under the NLRA for racist or sexist speech and conduct. It is time for the Board to leave behind the standards that excuse such language as incidental to the exercise of workplace rights or somehow excusable in the confrontational atmosphere of a picket line. The business world has largely moved away from such attitudes and the government must do so as well. The standards we suggest below establish an appropriate balance between protecting workers' rights by providing them some leeway for inappropriate workplace outbursts and giving employers the latitude to enforce their own workplace norms for the good of their employees as a whole.

a) The Board should establish a rebuttable presumption that racially or sexually offensive speech and conduct by employees is a permissible ground for discipline or termination under the NLRA.

When evaluating whether or not an employer has violated the NLRA by disciplining or terminating an employee who has engaged in offensive speech or conduct, we propose a test whereby the Board must first categorize the speech or conduct that is the basis for the employee discipline or discharge. In doing so, the Board will distinguish between speech or conduct that is profane or insubordinate and speech or conduct that is offensive on the basis of a protected status under Title VII. The definition of speech that is offensive on the basis of a protected status could be borrowed from Title VII precedents, but the general idea is to separate speech that is derogatory on the basis of a protected status from speech that is merely profane or disrespectful. It is important to note that the offensive speech or conduct would not, standing alone, need to create a hostile work environment under Title VII to create the presumption that it is not protected under the NLRA.

If the speech or conduct is not offensive on the basis of a Title VII protected status, then the Board would proceed to apply the *Atlantic Steel* factors or *Clear Pine Mouldings* test as appropriate and in line with past precedent. If the speech or conduct is found to be offensive on the basis of a Title VII protected status, then there is a rebuttable presumption that the employee's discipline or discharge does not violate the NLRA, regardless of whether the speech or conduct has taken place on the picket line (see below).

To balance the protection of employees' labor rights against the employer's need to comply with anti-discrimination laws and desire to maintain a diverse and respectful workplace, the employee can present evidence to rebut the presumption that the offensive speech or conduct

is unprotected by the NLRA. To overcome this presumption, the employee would present evidence suggesting that the employer's reaction to the offensive speech is a pretext to retaliate against the employee for exercising Section 7 rights. For example, the employee could present evidence that the employer does not have a policy prohibiting offensive language in the workplace; that the policy does not clearly prohibit the complained-of speech or conduct; or that the policy is not actually enforced. Evidence could be offered to show that the company has not disciplined similar speech or conduct in the past or has treated the employee more severely than other employees who had engaged in offensive speech or conduct. The employee could also offer evidence of the overall workplace culture – whether offensive speech is a routine feature of the culture and the employer has knowingly tolerated it.

This rebuttable presumption will effectively put employers on notice that if they wish to discipline or terminate an employee for racist or sexist speech or conduct without violating the NLRA, they must maintain a workplace culture where they respond consistently to reported incidents of racially or sexually offensive language and conduct. This presumption also provides the employee with assurance that the offensive speech is not being used as a pretext to deprive them of protection under the NLRA.

If the employee is able to show discipline or discharge for the offensive speech is improper, based on evidence described above, then the Board would still proceed to evaluate the employer's action under either *Atlantic Steel* or *Clear Pine Mouldings*, depending on the context of the case. This would usually result in a single instance of offensive speech or conduct being protected under the NLRA, much as they were in the cases noted above. However, often these outbursts of racial and sexual slurs are accompanied by other conduct – profanity, insubordination, or threats of violence that should still be evaluated under Board precedent.

b) The presumption against racially or sexually offensive speech and conduct should apply within the workplace as well as on the picket line

As we noted above, the most common context in which racially or sexually offensive speech and conduct occurs is during picket activity. For this reason, we think the presumption described above should apply equally to the picket line as it does to workplace conduct. It is a false distinction to say that the picket line is not equivalent to the workplace, especially when the relevant question is whether or not the company must reinstate the offending worker. In these cases, the company now knows that the worker is prone to making offensive comments, and other workers (including those in the class that the worker's conduct targeted) are likely aware as well. While the Board may continue to provide some leeway to picketing workers to account for the confrontational nature of the activity, we think that accounting for racist and sexist behavior that occurs on the picket line furthers the goals of Title VII within the company as well as the company's own goals for diversity and inclusion in the workplace.

CONCLUSION

We are pleased the Board has invited briefs on this subject, as it has been a matter of concern for ACC members and others in the business community for some time. We think the test described above for analyzing employee discipline or termination resulting from racially or sexually offensive speech strikes an appropriate balance between protecting workers rights and ensuring employers can comply with anti-discrimination laws, while accommodating corporate diversity and inclusion efforts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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